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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of:	)	WT Docket No. 97-199
	)	
WESTEL SAMOA, INC.	)	File No. 00560-CW-L-96
	)	
For Broadband Block C Personal	)	
Communications Systems Facilities	)	
	)	
and	)	
	)	
WESTEL, L.P.	)	File Nos. 00129-CW-L-97
	)	00862-CW-L-97
For Broadband Block F Personal	)	00863-CW-L-97
Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00866-CW-L-97

To: The Commission

APPLICATION FOR REVIEW

Robert L. Pettit  
Richard H. Gordin  
Bryan N. Tramont  
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(202) 429-7000

January 26, 1998

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ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Sections 1.301(a)(1) and (c)(2) of the Commission's rules, hereby requests review of the Presiding Officer's January 16, 1998 Memorandum Opinion and Order<sup>1</sup> denying ClearComm's intervention in the above captioned proceeding.<sup>2</sup> As detailed below, the facts likely to be examined in the proceeding and the central role of ClearComm's corporate conduct in the underlying events to be considered therein requires that ClearComm's intervention be granted without delay.<sup>3</sup>

The alleged misconduct of ClearComm's agents for bidding during the C Block auction for the Norfolk, Virginia BTA -- including Anthony T. Easton, former Director and Chief Executive Officer of Unicom, and Quentin L. Breen, former Director of Unicom<sup>4</sup> -- resulted in the imposition of a notice of apparent liability in the amount of \$1 million against ClearComm.<sup>5</sup> The instant proceeding has its

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<sup>1</sup> Memorandum Opinion and Order, Westel Samoa, Inc., and Westel, L.P., WT Docket No. 97-199, FCC 98M-3 (Jan. 16, 1998)(the "Order") (Attached as Exhibit A).

<sup>2</sup> For the Commission's convenience, appended hereto as Exhibits B through D are the pleadings filed in this matter. ClearComm's motion was supported by the Wireless Telecommunications Bureau but opposed by Westel.

<sup>3</sup> ClearComm respectfully requests that the Commission act in an expedited fashion on its application for review, as the hearing is set to begin Feb. 10. *See*, Order 97M-173 (Oct. 20, 1997) (Ex. F). The subject motion to intervene was timely filed on Nov. 13, 1997 (before discovery started) but was not acted on until Jan. 14 -- more than two months after its filing, well after the end of discovery, and on the eve of the filing of direct cases. (The ruling was "released" on Jan. 16, but not mailed to ClearComm counsel until Jan. 20).

<sup>4</sup> Subsequent to the bidding incident, ClearComm amended its applications to exclude Mr. Breen and Mr. Easton from any ownership or position of control. Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing and Order to Show Cause, WT Docket No. 97-199, FCC 97-322, (Sept. 9, 1997), at ¶ 7. ("HDO").

<sup>5</sup> *Application of PCS 2000, L.P., Notice of Apparent Liability for Forfeiture* 12 FCC Rcd 1703, ¶ 55 (1997) ("PCS 2000 NAL"). Mr. Breen resigned from the Unicom Board of Directors on April 26, 1996. *See*, HDO at ¶ 34. Mr. Easton's interest in Unicom, held through the SDE Trust, was "squeezed out by the Unicom shareholders to cleanse the Applicant of those who made the misrepresentations."

genesis in the *same* alleged conduct, but now to review the character qualifications of Mr. Breen as a principal of Westel Samoa, Inc. and Westel, L.P. (collectively, “Westel”).<sup>6</sup>

Considering the elements of the case and their direct relationship to ClearComm’s interests, the Presiding Judge’s exclusion of ClearComm is clearly erroneous and should be reversed. First, this hearing may contradict the facts already established by the Commission in its *PCS 2000 NAL*. That is, the Presiding Officer has not established whether the facts regarding misrepresentation determined in the *PCS 2000 NAL* are to be taken as the law of the instant case. Indeed, when the Bureau sought to determine whether the facts underlying the *HDO* would be assumed true or re-examined in the upcoming hearing, the Presiding Officer did not decide the issue. The Bureau asked: “[A]re you taking it as a given that misrepresentations took place, or are you wanting that to be proven and then to flow from that what actions and knowledge Mr. Breen had thereafter?”<sup>7</sup> The Judge responded: “[T]he answer to your question is I really don’t know.”<sup>8</sup> With the scope of these proceedings thus undetermined, except for the obvious and central emphasis on Mr. Easton’s and Mr. Breen’s conduct as company officials, ClearComm should be permitted to intervene to protect its interests. As further detailed in Exhibit B, the potential for the production and review of evidence regarding events involving PCS 2000 places ClearComm’s petition squarely within the ambit of Commission precedent – cases in which the FCC has granted intervention when findings may “impugn [a licensee’s]

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<sup>6</sup> The Presiding Officer claims ClearComm has no interest in the “grant or denial of the [Westel’s] application.” Order at ¶ 9. Yet the only issue underlying the review of Westel’s application is Mr. Easton’s and Mr. Breen’s conduct as PCS 2000 officials. Their interests and ClearComm’s, therefore, cannot be separated.

<sup>7</sup> Oct. 15, 1997 Hearing Conf., Tr. at 26. (Ex. E).

<sup>8</sup> *Id.* at 26. Matters are further blurred by the Judge’s Order limiting the scope of deposition testimony and Mr. Easton’s subsequent refusal to testify regarding the underlying conduct. See Westel Samoa, FCC 97M-189 at ¶ 5. (Ex. G)

character and his ability to earn a livelihood in the communications industry.”<sup>9</sup> Just as in *Palmetto Communications Co.*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991), it is obvious that the evidence adduced in this hearing “might collaterally reflect adversely” on ClearComm.<sup>10</sup>

Yet even if the scope of the proceeding was crystal clear, the Presiding Officer has failed to adequately consider the range of issues related to ClearComm that may arise in this case and which warrant intervention.<sup>11</sup> The lone subject of the *HDO* is the conduct of Messrs. Breen and Easton while *officers of PCS 2000*.<sup>12</sup> This hearing, therefore, will focus on nothing else other than the conduct of ClearComm and its former principals in the Round 11 PCS C Block auctions.<sup>13</sup> Grounds for intervention can not be more clearly stated.

Apparently in response to ClearComm’s legitimate concerns, the Presiding Officer suggests that ClearComm should rest easily on the sidelines because the Bureau believes “it is highly unlikely that any of the findings in this case would ever be used against ClearComm in the future” and that any factual exploration of ClearComm’s “qualifications” is “extremely remote.” Order at ¶¶ 11,12. In point of fact, however, the Bureau has no such exclusive control over the fact-finding in this case, and

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<sup>9</sup> *West Jersey Broadcasting Co.*, 89 FCC 2d 469, 473 (1980); *see also Quality Broadcasting Corp.*, 4 R.R.2d 865, 866 (1965).

<sup>10</sup> ClearComm also notes, as the Commission is well aware, that if Mr. Breen is held to “meet[] the relevant character qualification to hold a Commission license” he will be permitted to exercise stock warrants in ClearComm’s parent, giving him a stake in the company. *See, PCS 2000 NAL* at ¶4. Therefore ClearComm has a clear interest in the grant or denial of Westel’s application.

<sup>11</sup> ClearComm has argued intervention is appropriate both as a matter of right and under the discretionary standard. 47 C.F.R. § 1.223(a) and (b).

<sup>12</sup> *HDO*, at ¶1.

<sup>13</sup> The Order asserts that ClearComm’s contentions regarding the potential impact of this hearing on its standing before the Commission are “purely conjectural.” Order at ¶ 12. Yet, absent a concretely defined scope of the hearing or the nature of the parties cases, ClearComm is left no recourse beyond conjecture.

ClearComm should not be made to rely on such assurances to protect its reputation before the Commission and the financial welfare of its investors. Certainly Mr. Easton<sup>14</sup> – whose petition for reconsideration of the *HDO* is pending<sup>15</sup> – denies the conclusions of *PCS 2000 NAL*.<sup>16</sup> Similarly, Mr. Breen's attorneys has denied the factual suppositions contained in the *HDO*, which are taken directly from *PCS 2000 NAL*.<sup>17</sup> Therefore, rather than "unlikely" or "remote", there is *every indication* that this proceeding will re-examine ClearComm's conduct addressed in the *PCS 2000 NAL*. ClearComm must be allowed to participate in such proceedings.

Even if the Commission denied intervention as of right, ClearComm urges acceptance of the Bureau's argument for discretionary intervention based on the fact that the company has "established that it has an interest in the proceeding" and demonstrated that it is "well able to assist in the discovery of evidence of the events relevant to the designated issues."<sup>18</sup> Many of the questions raised in the *HDO*

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<sup>14</sup> As partners in Romulus Communications, Messrs. Easton and Breen were ClearComm's bidding agents during the C Block auctions. ClearComm is seeking damages in District Court for their alleged misconduct and recovery of all costs arising out of that alleged misconduct. The Presiding Officer's reliance on *Arizona Mobile Telephone Co.*, 80 FCC 2d 87, 90 (Rev. Bd. 1980) to dismiss this point is misplaced. Order ¶ 10. That case, in which creditors sought intervention in a license proceeding, applied its prohibition only where intervention as a matter of right was sought "solely on the ground" that a party has a financial stake in the survival of the parties. Such is not the case here.

<sup>15</sup> Petition for Reconsideration of Anthony T. Easton, WT Docket 97-199 (filed Oct. 6, 1997).

<sup>16</sup> *Id.* at 24 ("[T]he Commission's investigative finding as to his conduct cannot have any preclusive effect under the doctrines of res judicata...or collateral estoppel").

<sup>17</sup> Motion for Summary Decision of Westel Samoa, Inc., Westel, L.P and Quentin L. Breen, WT Docket 97-199, at 33-34 (filed Jan. 21, 1998).

<sup>18</sup> Wireless Telecommunications Bureau's Comments in Support of Petition to Intervene at ¶ 4 (Nov. 24, 1997) (Ex. C); *See also, Palmetto Communications Company*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991) (party's participation may help "sharpen up the evidence"). The Presiding Officer has decided against this rationale on several grounds. First, even absent intervention, ClearComm's witnesses may be forced to cooperate. If this test was supported, parties would never be entitled to discretionary intervention because any licensee could otherwise be required to produce information. Second, he posits that

(...Continued)

are based on information supplied to the Commission by ClearComm during the course of the Commission's previous investigation.<sup>19</sup> As set out above, ClearComm's participation is central to the essence of this proceeding. Accordingly, granting ClearComm's petition to intervene will enable the Presiding Officer to rule on the designated issues based on the most complete record possible.

For all the foregoing reasons, the Commission should grant ClearComm's Petition for Review and authorize its full participation in the above-captioned proceeding immediately.

Respectfully submitted,

**CLEARCOMM, L.P.**

By: 

Robert L. Pettit  
Richard H. Gordin  
Bryan N. Tramont

of

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January 26, 1998

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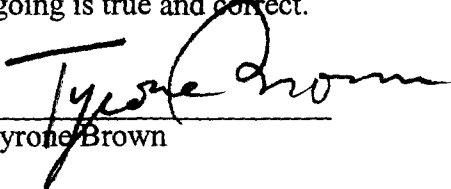
ClearComm must show that the "Wireless Bureau is unwilling, unable, or incapable of fulfilling its responsibilities" as an intervention pre-requisite. Order ¶ 13. ClearComm wonders if any petition could ever meet that burden. Here, ClearComm's role is not to supplant the Bureau, but to augment the parties' discovery efforts. Third, the Presiding Officer criticizes ClearComm's failure to show that any "information which it does possess is not available for the use of the Wireless Bureau." Order ¶ 13. Surely ClearComm should not be penalized for cooperation with the Bureau's information requests for material the Bureau could obtain under Section 308(b). Finally, the Presiding Officer notes that ClearComm "failed to show that it alone possesses any factual evidence necessary for the development of a full and complete record." Order ¶ 13. Such a requirement, however, would encourage licensees to withhold facts as a means to later "bribe" their way into proceedings.

<sup>19</sup> See e.g. *HDO* ¶ 15 (citing Independent Counsel's Report, re: Mr. Easton's searches of Ms. Hamilton's desk); *HDO* ¶ 17 (citing Independent Counsel's Report re: Mr. Easton's possible destruction of documents); *HDO* ¶ 20 (citing Independent Counsel's Report re: Mr. Easton's representations to the Unicom Board). This report has been attacked by Mr. Breen. See, Westel Motion for Summary Decision, WT Docket No. 97-199, at 33-34 (filed Jan. 21, 1998).

**AFFIDAVIT OF TYRONE BROWN**

I, Tyrone Brown, Senior Vice President of ClearComm, L.P., a broadband PCS C Block licensee, declare that I have read the foregoing Expedited for Review Application and that the facts contained therein are true and correct to the best of my personal knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Tyrone Brown

January 26, 1998

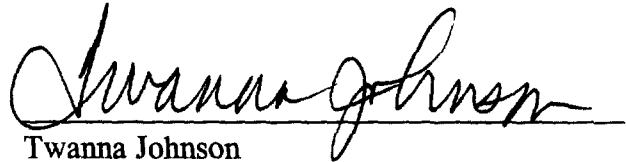
**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of January, 1998, I caused copies of the foregoing  
“Application for Review” to be hand-delivered to the following:

The Honorable Arthur I. Steinberg  
Federal Communications Commission  
Administrative Law Judge  
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Twanna Johnson



# **EXHIBIT A**

FCC 98M-3

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In re Applications of	)	WT Docket No. 97-199
	)	
WESTEL SAMOA, INC.	)	File No. 00560-CW-L-96
	)	
For Broadband Block C Personal	)	
Communications Systems Facilities	)	
	)	
and	)	
	)	
WESTEL, L.P.	)	File Nos. 00129-CW-L-97
	)	00862-CW-L-97
For Broadband Block F Personal	)	00863-CW-L-97
Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00866-CW-L-97

**MEMORANDUM OPINION AND ORDER**

Issued: January 14, 1998

Released: January 16, 1998

1. Under consideration are: (a) a Petition to Intervene, filed on November 13, 1997, by ClearComm, L.P. ("ClearComm"); (b) Comments in support of (a), filed on November 24, 1997, by the Wireless Telecommunications Bureau ("Wireless Bureau" or "Bureau"); (c) a Request for Acceptance and Consideration of Late Filed Pleading, filed on November 28, 1997, by Westel Samoa, Inc., Westel, L.P., and Quentin L. Breen (collectively "Westel");<sup>1</sup> (d) an Opposition to (a), filed on November 28, 1997, by Westel; and (e) a letter from counsel for ClearComm, dated December 2, 1997, addressed to the Presiding Judge, a copy of which was filed with the Office of the Secretary on December 2, 1997, "for association with the official record of [this proceeding]."

**ClearComm's Letter**

2. On the Presiding Judge's own motion, the December 2, 1997, letter from counsel for ClearComm to the Presiding Judge will be dismissed. First, counsel's letter is in actuality a pleading opposing Westel's Request for Acceptance and replying on the merits to Westel's Opposition to Petition to Intervene. It is well settled that the letter form of pleading is neither

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<sup>1</sup> Good cause having been shown, Westel's Request for Acceptance and Consideration of Late Filed Pleading will be granted and its Opposition to Petition to Intervene will be accepted. Westel is advised, however, that in the future it is expected that, if a pleading deadline cannot be met, a motion seeking an extension of time be filed prior to the due date of the pleading, as contemplated in Section 1.46(c) of the Rules.

countenanced by Commission precedent nor contemplated by the Commission's Rules. See Belo Broadcasting Corp., 44 FCC 2d 534, 537 (1973), and Action Radio, Inc., 37 FCC 2d 351, 353 (1972). Although ClearComm, at note 1 of its letter, requests permission to file "its reply . . . in letter form," no reasons for the request have been advanced and no good cause for granting such a departure from established practice has been demonstrated.<sup>2</sup>

3. Second, and more significantly, the Commission's rules do not permit the filing of a reply to an opposition to a petition to intervene. Ellis Thompson Corporation, 10 FCC Rcd 7325, 7326 (¶ 7) (Rev. Bd. 1995), rev. denied 10 FCC Rcd 11434 (1995); see Sections 1.223 and 1.294 of the Rules. Therefore, counsel's letter, even if it had been filed in the form of a pleading, constitutes an unauthorized reply and, as such, is entitled to no consideration. See D. H. Overmyer Communications Co., 4 FCC 2d 496, 505 (Rev. Bd. 1966); see also Filing of Supplemental Pleadings Before the Review Board, 40 FCC 2d 1026 (Rev. Bd. 1972).<sup>3</sup> ClearComm, at note 1 of its letter, implicitly contends that it has a right to file a reply pursuant to Section 1.45 of the Rules. However, that section is not applicable to pleadings filed in adjudicatory proceedings. See Sections 1.201 and 1.294 of the Rules, and the Note to Section 1.45 of the Rules.

#### Petition to Intervene

4. ClearComm argues that it has a direct financial interest in the outcome of this proceeding which is sufficient to confer party-in-interest status as a matter of right pursuant to Section 1.223(a) of the Commission's Rules. Specifically, ClearComm states that it "may be affected" by this proceeding due to the pendency of a civil lawsuit in the Superior Court of San Juan, Puerto Rico, between ClearComm and its former corporate bidding services provider, Romulus Telecommunications, Inc. ClearComm contends that any factual or legal finding regarding the events in question in this proceeding "may have a collateral impact" on the outcome of this civil litigation. According to ClearComm, this is sufficient to grant it status as an intervenor as of right. (Petition at 3.)

5. In addition, ClearComm maintains that the factual findings in the instant case "could clearly affect [its] standing before the [Commission]." This is so, ClearComm alleges, because this proceeding will undoubtedly examine the conduct of certain individuals in connection with bids placed on January 23, 1996, in the Commission's Broadband PCS C Block auction. ClearComm avers that such an examination "may result in evidence of ClearComm's corporate conduct in the auctions" and possibly cause that conduct to "be specifically reviewed." Since

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<sup>2</sup> In Order, FCC 97M-192, released November 21, 1997, it was stated that ClearComm, as a non-party, was not entitled to file pleadings "unrelated to its petition to intervene." Since the subject matter of its letter was related to the Petition to Intervene, it could have been filed in pleading form.

<sup>3</sup> Although Overmyer and Supplemental Pleadings were issued by the Review Board, they were cited as precedent by the Commission in KAYE Broadcasters, Inc., 47 FCC 2d 360, 361 n.4 (1974).

evidence of that nature "might collaterally reflect adversely"<sup>4</sup> on ClearComm, it asserts that it has "an obvious interest in the outcome of this proceeding." (Petition at 4-5.)

6. Alternatively, ClearComm argues that it should be permitted to intervene under Section 1.223(b) of the Rules as a matter of the presiding officer's discretion. In support, ClearComm states that this proceeding had its genesis in an earlier proceeding in which ClearComm's predecessor was involved and "many of the questions raised in the [hearing designation order in this case] are based on information supplied to the Commission by ClearComm during the course of the Commission's previous investigation." ClearComm further contends that its participation "may well help 'sharpen up the evidence'"<sup>5</sup> because ClearComm and its employees "undoubtedly will be valuable sources of information," and ClearComm has an "interest distinct from that of Westel." (Petition at 6-7.)

7. The Wireless Bureau supports ClearComm's position that it may intervene as a matter of right. In this regard, the Bureau states that "evidence could be adduced [herein] which could affect ClearComm's interests." In addition, the Bureau submits that ClearComm has an "identifiable interest" because the proceeding "involves the conduct of officers of [ClearComm's predecessor]." (Comments at 2.)<sup>6</sup> The Bureau also maintains that ClearComm should be allowed discretionary intervention since it has demonstrated that it will be able to assist in the adduction of evidence, and current employees of ClearComm "may be valuable witnesses in this proceeding." (*Id.* at 3.)

8. Westel opposes ClearComm's petition, arguing that ClearComm does not have any cognizable interest upon which party-in-interest status might be based and there has been no demonstration that ClearComm's intervention would enhance the development of a complete and accurate record. (Opposition at 3-8.)

9. The Petition to Intervene will be denied. Section 1.223(a) of the Rules, which implements Section 309(e) of the Communications Act of 1934, as amended, states that "any person who qualifies as a party in interest," but who has not been named a party by the Commission, may acquire the status of a party by filing a petition for intervention "showing the basis of its interest." A "party in interest" has been defined as "a person aggrieved or whose interests are adversely affected by grant or denial of the application [under consideration in the proceeding]." Hertz Broadcasting of Birmingham, Inc., 46 FCC 2d 350, 352 (Rev. Bd. 1974) (emphasis added). Further, a petitioner seeking intervention must show "a potential direct and substantial injury which could result from the outcome of [the] proceeding," *i.e.*, the grant or

<sup>4</sup> Palmetto Communications Co., 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991).

<sup>5</sup> *Id.*

<sup>6</sup> However, the Bureau further remarks that it "does not intend to use the instant proceeding to investigate ClearComm's qualifications [because] the Bureau is satisfied that the Commission fully resolved that issue in PCS 2000, L.P., 12 FCC Rcd 1681 (1997), recon. pending." (Comments at 2, emphasis added.)

denial of the application in question. Id. Moreover, the burden of making such a showing is on the petitioner, and "specific allegations of fact" must be provided supporting its claims. Ellis Thompson Corporation, 10 FCC Rcd at 11435.

10. ClearComm has failed to meet these stringent requirements. Specifically, ClearComm has not satisfied its burden of showing that it will be "aggrieved" or that its "interests [will be] adversely affected" by the grant or denial of the Westel applications involved in this proceeding. Nor has ClearComm demonstrated "a potential direct and substantial injury" which could result from the grant or denial of those applications. In this connection, ClearComm's arguments relating to the civil lawsuit in Puerto Rico do not provide any basis for intervention as of right. It does not appear that this civil suit involves the Westel applications, and it is well established that intervention will not be granted to protect the private interests of the petitioner. Arizona Mobile Telephone Co., 80 FCC 2d 87, 90 (Rev. Bd. 1980), citing Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1001 (D.C. Cir. 1966).

11. Further, ClearComm has not provided "specific allegations of fact" establishing that any of the findings in this case "could . . . affect [its] standing before the [Commission]." On the contrary, ClearComm's assertions in this regard appear to be based on nothing more than sheer speculation. Moreover, the Commission's rulings in PCS 2000, L.P., make it clear that ClearComm's qualifications to be a licensee are not in any way dependent upon the past actions of Westel or its principals. See 12 FCC Rcd 1703, 1717-18 (§ 50) (1997) and 12 FCC Rcd 1681, 1682 (§ 1) (1997). Additionally, in light of the Bureau's representation in its Comments that it "does not intend to use the instant proceeding to investigate ClearComm's qualifications [because] the Bureau is satisfied that the Commission fully resolved that issue [emphasis added]," it is highly unlikely that any of the findings in this case would ever be used against ClearComm in the future.

12. Palmetto Communications, cited by ClearComm in support of its intervention request, is distinguishable from the instant case. In Palmetto, which the Review Board termed an "unorthodox situation," it was clear that the petitioner had fully satisfied his burden of showing by specific allegations of fact that the evidence adduced at the hearing might reflect adversely on the petitioner himself and result in his "personal culpability" under the existing issues of that proceeding. 6 FCC Rcd at 5024.<sup>7</sup> Here, as discussed above, ClearComm has not established by specific allegations of fact that it would be adversely affected by the outcome of this proceeding.<sup>8</sup> Rather, its contentions are purely conjectural. Moreover, the fact that the Bureau has stated that it "is satisfied that the Commission [has] fully resolved" the issue of ClearComm's qualifications, indicates that the possibility of any further factual exploration of that matter is extremely remote.

<sup>7</sup> Although the petitioner in Palmetto was officially on record at the Commission as a 50 percent general partner of that applicant, he had given an affidavit to the opposing applicant stating that he had withdrawn as a general partner.

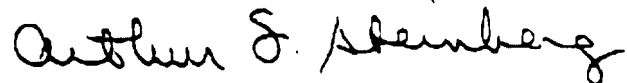
13. Next, ClearComm has not demonstrated that discretionary intervention pursuant to Section 1.223(b) of the Rules is warranted. This subsection provides, in pertinent part, that a petitioner seeking intervention thereunder must show how its participation "will assist the Commission in the determination of the issues in question." ClearComm has not met this test. First, the Commission has rejected as a basis for intervention familiarity with the facts of a case through participation in an earlier proceeding. Kenneth J. Crosthwait, 79 FCC 2d 191, 192-95 (1980). Further, ClearComm has failed to show that it alone possesses any factual evidence that would be necessary for the development of a full and complete record, or that the information which it does possess is not available for the use of the Wireless Bureau. In this regard, the appearance of ClearComm's employees as "valuable witnesses" at the hearing does not hinge on ClearComm's party status: such appearance may, if necessary, be compelled. Finally, ClearComm's petition virtually ignores the role of the Commission's operating bureaus, which are "entit[ies] expressly devised to take an independent role in Commission proceedings in the public interest,"<sup>9</sup> and ClearComm does not even contend that the Wireless Bureau is unwilling, unable, or incapable of fulfilling its responsibilities. Under these circumstances, ClearComm's participation in this proceeding as a party would be superfluous.

Accordingly, IT IS ORDERED that the December 2, 1997, letter to the Presiding Judge from counsel for ClearComm IS DISMISSED.

IT IS FURTHER ORDERED that the Request for Acceptance and Consideration of Late Filed Pleading, filed by Westel on November 28, 1997, IS GRANTED, and the Opposition to Petition to Intervene, filed by Westel on November 28, 1997, IS ACCEPTED.

IT IS FURTHER ORDERED that the Petition to Intervene, filed by ClearComm on November 13, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg  
Administrative Law Judge

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<sup>9</sup> Muncie Broadcasting Corp., 89 FCC 2d 123, 125 n.1 (Rev. Bd. 1982), quoting Pressley v. FCC, 437 F.2d 716, 719 (D.C. Cir. 1970). Although the quoted statement referred to the (then) Broadcast Bureau, it is submitted that the Wireless Bureau performs an identical role in proceedings such as this.

## **EXHIBIT B**

DUPLICATE

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re Applications of:	)	WT Docket No. 97-199
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Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00866-CW-L-97

To: Honorable Arthur I. Steinberg, Administrative Law Judge

**PETITION TO INTERVENE**

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Sections 1.223(a) and (b) of the Commission's rules, hereby petitions to Intervene ("Petition") in the above-captioned proceeding.<sup>1</sup> As detailed below, ClearComm submits that this proceeding may directly impact upon its interests and that the Company's participation will assist the Commission in gathering the information necessary to make fully informed rulings on the issues designated for hearing. Accordingly, the Presiding Officer should grant ClearComm's petition for

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<sup>1</sup> This petition is timely filed pursuant to Section 1.223(a) and (b), which require that a petition for intervention be filed within 30 days of publication of the  
(...Continued)



intervention without delay.

## I. INTRODUCTION

ClearComm is a limited partnership controlled by SuperTel Communications Corporation ("SuperTel"), its corporate general partner. ClearComm, formerly PCS 2000, is a limited partnership formed for the purpose of applying for C Block PCS authorizations. Prior to July 2, 1996, PCS 2000 was controlled by Unicom Corporation ("Unicom"),<sup>2</sup> its corporate general partner.<sup>3</sup> The alleged misconduct of agents of ClearComm during the C Block auction for the Norfolk, Virginia BTA -- including Anthony T. Easton, former Director and Chief Executive Officer of Unicom, and Quentin L. Breen, former Director of Unicom<sup>4</sup> -- was the subject of a Commission proceeding that resulted in the imposition of a notice of apparent liability in the amount of \$1 million against ClearComm.<sup>5</sup>

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issues designated for hearing in the *Federal Register*. 47 C.F.R. § 1.223(a) & (b). Such notice was published on October 15, 1997. 62 Fed. Reg. 53,628 (1997).

<sup>2</sup> On July 2, 1996, ClearComm submitted an amendment to each of its applications for C Block authorizations reflecting a change in the general partner of ClearComm from Unicom to SuperTel. Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 1703, 1714 (1997) ("NAL").

<sup>3</sup> For clarity, "PCS 2000" will be referred to by its current name "ClearComm" throughout this pleading.

<sup>4</sup> In response to the bidding incident, ClearComm amended its applications so that neither Mr. Breen nor Mr. Easton has any ownership interest or position of control in the Company. Hearing Designation Order ¶ 7.

<sup>5</sup> Application of PCS 2000, L.P., 12 FCC Rcd 1703, ¶ 55 (1997) Mr. Breen resigned from the Unicom Board of Directors on April 26, 1996. See Hearing Designation Order ¶ 34.

The instant proceeding arises out of the same alleged conduct, this time to review the character qualifications of Mr. Breen in his capacity as a principal of Westel Samoa, Inc. and Westel, L.P. (collectively, "Westel"), applicants for broadband PCS C and F Block licenses.

**II. CLEARCOMM HAS A DIRECT FINANCIAL INTEREST IN THE OUTCOME OF THE PROCEEDING SUFFICIENT TO CONFER "PARTY-IN-INTEREST" STATUS AS A MATTER OF RIGHT.**

ClearComm submits that it is entitled to intervention as of right to protect its interests in a pending collateral proceeding and as a Commission licensee.

Under Section 1.223(a) of the Commission's rules, a petitioner is entitled to intervene where a party can demonstrate that it may be affected by the administrative action under consideration.<sup>6</sup> ClearComm may be affected by this proceeding due to the pendency of a lawsuit between ClearComm and ClearComm's corporate bidding services provider during the C Block auctions, Romulus Telecommunications, Inc.<sup>7</sup> Mr. Breen holds a 50% beneficial interest in Romulus. In the court action, ClearComm has sought damages for the alleged misconduct associated with the C Block auction and recovery of all costs arising out of the alleged misconduct of the defendants, including Mr. Easton and Romulus. Therefore any factual or legal finding regarding those events in this proceeding may have a collateral impact on the outcome of ClearComm's litigation.

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<sup>6</sup> In re Application of Telephone and Data Systems, Inc., 9 FCC Rcd 2780, 2781 (Rev. Bd. 1994)("Telephone and Data Systems").

<sup>7</sup> PCS 2000, L.P., et al v. Romulus Telecommunications, Inc.; Anthony T Easton et al, Civ. No. KAC96-07 (803)(Commonwealth of Puerto Rico, Superior Court of San Juan).

Such an interest is sufficient to grant ClearComm status as an intervenor as of right.

In addition, part of the factual record that led both to the licensing of ClearComm and the designation of this proceeding necessarily will be at issue during the course of this hearing. As such, the factual findings in this case could clearly affect ClearComm's standing before the FCC. More specifically, while this proceeding is designed to examine the conduct of Mr. Breen, any examination of his post-bid conduct has as its necessary factual antecedent an inquiry into Mr. Breen's conduct as a bidding agent and director of Unicom, then ClearComm's corporate general partner. Such an inquiry, as well as the apparent necessity of examining Mr. Easton, may result in evidence of ClearComm's corporate conduct in the auctions. Although ClearComm believes these issues have been conclusively resolved, evidence regarding these issues undoubtedly will be produced in the course of this hearing. Moreover, it is possible that ClearComm's corporate conduct will be specifically reviewed.<sup>8</sup> The production of such evidence and the possibility of such a review place this case squarely within well-established Commission precedent in which the FCC has allowed intervention where findings may

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<sup>8</sup> Indeed the Presiding Officer has yet to determine whether the facts underlying the Hearing Designation Order will be assumed true, or rather will be reexamined in this proceeding. October 15, 1997 Hearing Conference, Tr. 26-27. The Wireless Telecommunication Bureau's pleading has also raised the specter of reopening the inquiry into ClearComm's C Block bid irregularities. Opposition to Petition for Reconsideration of Wireless Telecommunications Bureau, WT Docket No. 97-199, at 12 (filed October 16, 1997). These issues have long ago been resolved and ClearComm would strenuously oppose any reexamination of these issues as both unwarranted and violative of res judicata principles. Any further factfinding regarding this matter may have direct and deleterious effect on ClearComm's standing as a Commission licensee; thus, it is undeniable that ClearComm may be "aggrieved or adversely affected" by the administrative action being contemplated.

"impugn [a licensee's] character and his ability to earn a livelihood in the communications industry".<sup>9</sup> As in *Palmetto Communications Co.*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991), the evidence adduced in this hearing "might collaterally reflect adversely" on ClearComm. Thus, ClearComm has an obvious interest in the outcome of this proceeding and its petition to intervene as of right should be granted.<sup>10</sup>

**III. ALTERNATIVELY, CLEARCOMM SHOULD BE GRANTED INTERVENTION BECAUSE IT WILL CONTRIBUTE TO THE DEVELOPMENT OF A COMPLETE AND ACCURATE RECORD.**

Even if the Presiding Officer were disinclined to allow intervention as of right, Section 1.223(b) of the Commission's rules permits intervention in the discretion of the presiding officer where the petitioner can demonstrate that it has an "interest" in the proceeding and that its participation "will assist the Commission in the determination of the issues in question".<sup>11</sup>

ClearComm has a demonstrable interest in the outcome of this proceeding. As indicated above, Mr. Breen at one time was a director of ClearComm's former general partner Unicom, and he also served as an auction bidding agent for ClearComm. The

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<sup>9</sup> West Jersey Broadcasting Co., 48 R.R.2d 970, 974 (1980). See also Quality Broadcasting Corp., 4 R.R.2d 865, 866 (1965)(intervention granted on showing that initial decision contained findings which "adversely affect [licensee's] reputation for truth and veracity, his reputation in the broadcasting community, his standing before the Commission, and his ability to continue to earn a livelihood in the broadcasting industry").

<sup>10</sup> In addition, ClearComm has no "unity of interest" with Westel or Mr. Breen. As such, it may not reasonably "have the designated issues defended solely" by Westel. ClearComm's interests relate solely to its corporate conduct surrounding the C Block auction and do not correlate with the distinct and broader interests of Westel.

issues designated in this proceeding deal exclusively with Mr. Breen's conduct in these capacities. Indeed, the primary purpose of the hearing is to "determine the facts and circumstances surrounding the conduct of Quentin L. Breen in connection with PCS 2000's bids placed on January 23, 1996, in the Commission's Broadband PCS C Block auction".<sup>12</sup>

The Commission has granted PCS licenses to ClearComm based on the factual record adduced in the proceeding leading up to the NAL.<sup>13</sup> Moreover, many of the questions raised in the HDO are based on information supplied to the Commission by ClearComm during the course of the Commission's previous investigation. Indeed, the HDO repeatedly cites a report by an independent counsel which was initiated by ClearComm.<sup>14</sup> Therefore, ClearComm's investigation and conclusions are central to the very foundations of this proceeding, making ClearComm's presence particularly important.

Moreover, ClearComm submits that its participation in this proceeding will fundamentally assist in the determination of the designated issues. In the instant case, ClearComm and its employees undoubtedly will be valuable sources of information. In

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<sup>11</sup> 47 C.F.R. Sec. 1.223(b).

<sup>12</sup> Hearing Designation Order ¶ 53.

<sup>13</sup> PCS 2000, L.P., Notice of Apparent Liability for Forfeiture, 12 FCC Rcd. 1703 (1997).

<sup>14</sup> See Hearing Designation Order ¶ 15 (citing Independent Counsel's Report regarding Mr. Easton's searches of Ms. Hamilton's desk); Hearing Designation Order ¶ 17 (citing Independent Counsel's Report regarding Mr. Easton's possible destruction  
(...Continued)

addition, since ClearComm has an interest distinct from that of Westel, its participation may well help "sharpen up the evidence".<sup>15</sup> Accordingly, granting ClearComm's petition to intervene will enable the Presiding Officer to rule on the designated issues based on the most complete record possible.

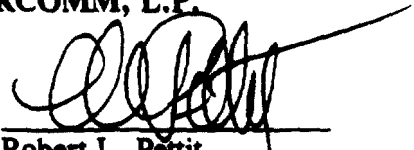
#### IV. CONCLUSION

For all the foregoing reasons, the Commission should grant ClearComm's Petition for Intervention and authorize its full participation in the above-captioned proceeding immediately.

Respectfully submitted,

**CLEARCOMM, L.P.**

By:



Robert L. Pettit  
Richard H. Gordin  
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Scott D. Delacourt

of

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November 13, 1997

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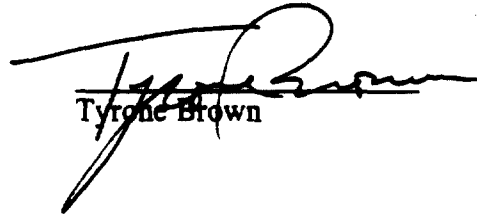
of documents); Hearing Designation Order ¶ 20 (citing Independent Counsel's Report regarding Mr. Easton's representations to the Unicom Board).

<sup>15</sup> Palmetto Communications Company, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991).

**AFFIDAVIT OF TYRONE BROWN**

I, Tyrone Brown, Senior Vice President of ClearComm, L.P., a broadband PCS C Block licensee, declare that I have read the foregoing "Petition to Intervene" and that the facts contained therein are true and correct to the best of my personal knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

  
Tyrone Brown

November 13, 1997

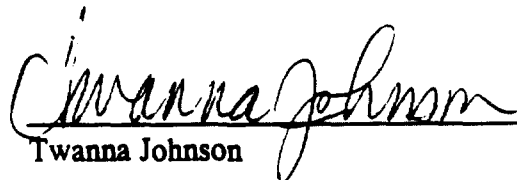
**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of November, 1997, I caused copies of the foregoing "Petition to Intervene" to be hand-delivered to the following:

The Honorable Arthur I. Steinberg  
Federal Communications Commission  
Administrative Law Judge  
2000 L Street, N.W., Room 229  
Washington, D.C. 20554

A. Thomas Carroccio  
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Joseph P. Weber  
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Twanna Johnson



# EXHIBIT C